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CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TYRONE EBANIZ, Defendant and Appellant.	F054696 (Super. Ct. No. VCF069782A)
In re TYRONE EBANIZ, On Habeas Corpus.	F055939 MODIFICATION OF OPINION AND DENIAL OF REHEARING [NO CHANGE IN JUDGMENT]

The opinion filed in this case on June 3, 2009, is modified as follows:

1. The final sentence of the first full paragraph on page 24 of the typed opinion (beginning, "We must be able to") is modified to read:

> We must be able to conclude that, in light of the evidence already presented at trial, the newly discovered evidence has such truthfulness and compelling force that no reasonable jury could reject it and, once accepted by the trier of fact, it could only result in a verdict more favorable to the defendant, as it did here in Ebaniz's third trial.

2. The first sentence in the first full paragraph on page 25 of the typed opinion (beginning, "If believed, the new evidence") is modified to delete "If believed," The sentence now reads:

> The new evidence completely undermines the prosecution's entire case and points unerringly to innocence.

3. The final paragraph of the Discussion, at pages 30-31 of the typed opinion (beginning, "At oral argument, the Attorney General asserted"), is deleted and the following inserted:

> At oral argument, the Attorney General emphasized the importance of finality of judgment, stating in part: "What the habeas case really comes down to in this matter … is … finality of judgment.… What we have here is … endless litigation, [in] which nothing is finally ever determined in this case, which the Supreme Court recently has stated … is worse than sometimes [an] occasional miscarriage of justice. So what we have, essentially, is a third bite of the apple …."
>
> We reject the notion that the imprisonment of an innocent person constitutes a mere miscarriage of justice that must give way to the need for finality of judgment. Instead, such a result is precisely what our system of justice strives to prevent. That Seriales's testimony could not be presented before the third trial was due to no fault of Ebaniz; moreover, the errors that caused the prosecutor to take multiple "bites of the apple," by seeking multiple retrials, similarly are not attributable to Ebaniz.
>
> By no means do we suggest that a final judgment should be opened whenever there is the possibility a jury, faced with newly discovered evidence, might acquit. Where, as here, the new evidence's probative force and unassailable credibility are such that we can have no confidence in the conviction, however, the concept of finality of judgment must give way. Otherwise, the consequence of the Attorney General's argument would be that no new evidence, no matter how strong and credible, would ever be enough to warrant a new trial. Regardless of the fact the United States Supreme Court has yet to determine whether there exists a federal constitutional right to be released upon proof of actual innocence (see, e.g., *District Attorney's Office for Third Judicial Dist. v. Osborne* (2009) 557 U.S. ___, ___ [2009 LEXIS 4536 *33], Ebaniz has "a liberty interest in demonstrating his innocence with new evidence under state law." (*Id*. at p. ___ [2009 LEXIS 4536 *27].)

While arguing for finality of judgment on the one hand, the Attorney General seeks additional proceedings on the other. Thus, he has insisted, at oral argument and in his petition for rehearing, that we cannot order a new trial without first remanding the matter for an evidentiary hearing, in order that a referee may make credibility determinations and factual findings, and examine the evidence to see whether it was so credible that no reasonable jury could reject it as being the truth.[1] The Attorney General claims that by granting relief without such a hearing, we contradict *Lawley*, *supra*, 42 Cal.4th 1231.

The Attorney General is wrong. In *Lawley*, the newly discovered evidence took the form of a *declaration*. (*Lawley*, *supra*, 42 Cal.4th at pp. 1234, 1237.) In stark contrast to the new evidence here, the evidence initially came before the California Supreme Court untested by cross-examination or any determination as to the credibility of Seabourn, the declarant; hence the need for an evidentiary hearing at which a trier of fact could make the necessary findings. Nothing in *Lawley* suggests the same need or requirement exists in a situation such as we have before us. Here, unlike *Lawley*, the evidence in question has already been subjected to rigorous cross-examination on the very factual matters now at issue, and Seriales's credibility has been vigorously contested, in the ultimate adversarial proceeding of a trial.

This is not a situation in which, when considered in terms of the evidence presented at Ebaniz's first trial, Seriales's testimony merely presents a more difficult question for the jury. (Compare *Lawley*, *supra*, 42 Cal.4th at p. 1242 [although reasonable jury might have credited testimony pointing to Lawley's innocence, reasonable jury might also have disbelieved Seabourn and instead credited the numerous witnesses at Lawley's original trial who testified that Lawley paid to have victim killed].) Twelve triers of fact – a jury – have already found Seriales's testimony to be credible and to undermine the prosecution's entire case. In our view, no reasonable jury could reject the new evidence or, upon crediting it, convict Ebaniz. Accordingly, the appropriate remedy in this case is reversal of the judgment and a new trial.

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1 California Rules of Court, rule 4.551(f), upon which the Attorney General relied in part at oral argument for the proposition that such a hearing is required, applies to habeas proceedings in the superior, not appellate, court. (See Cal. Rules of Court, rule 4.550(a).)

There is no change in the judgment.

Respondent's petition for rehearing is denied.

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Ardaiz, P.J.

WE CONCUR:

_____
Wiseman, J.

_____
Gomes, J.